

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONTE MORGAN, et al.,)	
)	
Plaintiff(s),)	No. C08-5211 BZ
)	
v.)	
)	
HARMONIX MUSIC SYSTEMS,)	AMENDED ORDER ON DEFENDANTS'
INC., et al.,)	MOTION TO DISMISS FIRST
)	AMENDED COMPLAINT AND MOTION
)	TO STRIKE
Defendant(s).)	
_____)	

Defendants Harmonix Music Systems, Inc., MTV Networks, and Electronic Arts, Inc. (collectively "defendants") move to dismiss plaintiffs' first amended consumer class action complaint ("complaint"), which alleges violations of California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* ("CLRA"); Cal. Bus. & Prof. Code §§ 17200 *et seq.*; ("UCL") as well as violations of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 *et seq.*

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1 ("Song-Beverly Act").¹ Plaintiffs purchased defendants' Rock
 2 Band video game and drum pedal hardware and allege that the
 3 drum pedal was defective and broke within months of purchase.
 4 For the reasons set forth below, defendants' motion to
 5 dismiss for failure to state a claim under Rule 12(b)(6) is
 6 **DENIED IN PART AND GRANTED IN PART.**²

7 Defendants challenge plaintiffs' first claim, for breach
 8 of the implied warranty of merchantability, contending that
 9 the implied warranty on the drum pedal is coextensive with
 10 the express 60 day warranty and expired before plaintiffs'
 11 drum pedals broke.

12 The implied warranty of merchantability arises by
 13 operation of law. Hauter v. Zogarts, 14 Cal. 3d 104, 117

15 ¹ On January 1, 1965, the Uniform Commercial Code took
 16 effect in California. (Cal. U. Com. Code, § 1101 *et seq.*; see
 17 also Stats. 1963, ch. 819, and 23A West's Ann. Cal. U. Com.
 18 Code, p. 1.) Division 2 of that code, also known as "Uniform
 19 Commercial Code -- Sales," applies to "transactions in goods."
 20 Cal. U. Com. Code, § 2101, 2102. The provision describing the
 21 implied warranty of merchantability appears at section 2314.
 22 Although the Uniform Commercial Code provides a similar
 23 warranty of merchantability, its provisions proved "limited in
 24 providing effective recourse to a consumer dissatisfied with a
 25 purchase." Krieger v. Nick Alexander Imports, Inc., 234 Cal.
 26 App. 3d 205, 213 (1991). In order to provide greater
 27 protections and remedies for consumers, the Legislature enacted
 28 the Song-Beverly Act. Robertson v. Fleetwood Travel Trailers
of California, Inc., 144 Cal. App. 4th 785, 801 (2006). It "is
 strongly pro-consumer" and "makes clear its pro-consumer
 remedies are in addition to those available to a consumer
 pursuant to the [Uniform] Commercial Code" Murillo v.
Fleetwood Enterprises, Inc., 17 Cal. 4th 985, 990 (1998) To "the
 extent that the [Song-Beverly] Act gives rights to the buyers
 of consumer goods, it prevails over conflicting provisions of
 the Uniform Commercial Code." 4 Witkin, Summary of Cal. Law
 (10th ed. 2005) Sales, § 52, p.63 (citing Civ. Code, § 1790.3).

² All parties have consented to my jurisdiction,
 including entry of final judgment, pursuant to 28 U.S.C.
 § 636(c) for all proceedings.

(1975). It does not "impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 694 (1954); Moore v. Hubbard & Johnson Lumber Co., 149 Cal. App. 2d 236, 240-241 (1957). Under the Song-Beverly Act, the duration of the implied warranty of merchantability is the same as the duration of any reasonable express warranty that accompanies the product, but in no event shorter than 60 days or longer than one year. See Cal. Civ. Code, § 1791.1, subd. (c).

The Court is not prepared to rule as a matter of law that 60 days is a reasonable duration of the implied warranty of merchantability for the drum pedal. Defendants have cited no authority, and the Court has found none, which requires such a ruling. Under the Commercial Code, the reasonableness of any time period depends on the facts and circumstances surrounding its invocation. See Cal. U. Com. Code § 1205 (2008) ("Whether a time for taking an action required by this code is reasonable depends on the nature, purpose, and circumstances of the action."). For products which are likely to be used shortly after purchase and, if defective, fail immediately, sixty days may be a reasonable warranty period. But there are also products which are less likely to be used directly upon purchase or whose defect may not show up for some time.

Here, the drum pedal accompanies a video game and, plaintiffs allege, is often bought as a gift, meaning that it may not be used until well after its purchase. In addition,

1 the defect is latent and may not be apparent on early use.
 2 Furthermore, plaintiffs allege that defendants acknowledged
 3 the unreasonableness of the 60 day period by advising the
 4 public that until October 1, 2008, it would replace a damaged
 5 drum pedal even after the 60 day period had expired. Under
 6 these circumstances, plaintiffs have sufficiently alleged a
 7 claim for breach of the implied warranty of merchantability.

8 On July 2, 2009, the Court *sua sponte* raised the issue
 9 of vertical privity.³ Defendants argued that the complaint
 10 fails to allege facts establishing contractual vertical
 11 privity between plaintiffs and defendants. Under the
 12 California Commercial Code, a plaintiff asserting breach of
 13 warranty claims must stand in vertical contractual privity
 14 with the defendant. See Clemens v. Daimlerchrysler
 15 Corporation, 534 F.3d 1017, 1023 (9th Cir. 2008). While both
 16 parties agree that the Song-Beverly Act does not require
 17 vertical privity, defendants nonetheless argue that insofar
 18 as plaintiffs' implied warranty of merchantability claim is
 19 based on the Song-Beverly Act, it should be dismissed
 20 because, *inter alia*, plaintiffs have failed to allege that
 21 they purchased the Rock Band drum pedal in California. The
 22 Song-Beverly Act only governs goods sold at retail in
 23 California. Cal. Civ. Code § 1792; see also Anunziato v.
 24 eMachines, Inc., 402 F. Supp. 2d 1133, 1142 (C.D. Cal. 2005).

25
 26 ³ After further briefing from the parties, plaintiffs'
 27 motion to amend the Court's prior order dismissing plaintiffs'
 28 complaint with leave to amend is **GRANTED**. By the consent of
 both parties, who have agreed that the Song-Beverly Act does
 not contain a vertical privity requirement, this order
 supersedes the Court's prior order (Doc. No. 77).

1 Here, the complaint neither identifies where nor from whom
2 plaintiffs purchased Rock Band and therefore fails to state a
3 claim under either the California Commercial Code or the
4 Song-Beverly Act. Accordingly, plaintiffs' breach of implied
5 warranty of merchantability claim is **DISMISSED** with leave to
6 amend.

7 Defendants next attack plaintiffs' CLRA claims. As a
8 threshold matter, defendants argue that plaintiff Monte
9 Morgan ("Morgan") lacks standing to sue under the CLRA
10 because he is a resident of Kansas and did not purchase Rock
11 Band in California.⁴

12 California courts have extended state-created remedies
13 to out-of-state parties harmed by wrongful conduct only when
14 that conduct occurs in California. See, e.g., Diamond
15 Multimedia Systems, Inc. v. Superior Court, 19 Cal. 4th 1036
16 (1999); Norwest Mortgage, Inc. v. Superior Ct., 72 Cal. App.
17 4th 214, 224-25 (1999) ("State statutory remedies may be
18 invoked by out-of-state parties when they are harmed by
19 wrongful conduct occurring in California."). Here,
20 plaintiffs' complaint alleges only that defendant Electronic
21 Arts, Inc., the distributor of Rock Band, is headquartered in
22 California. There are no allegations connecting the other
23 defendants to California. The complaint fails to allege what
24 conduct of the defendants, if any, that violated the CLRA
25 took place in California or how Morgan was injured in

27 ⁴ Whether absent class members have standing to sue
28 under California Consumer Protection Laws is better addressed
in connection with class certification.

1 California. See In re Mattel, Inc., 588 F. Supp. 2d 1111
 2 (N.D. Cal. 2008) (complaint alleged, *inter alia*, that
 3 reports, company statements, and advertisements containing
 4 misrepresentations were approved by Mattel in California). I
 5 therefore conclude that plaintiffs have failed to allege
 6 sufficient facts to establish that Morgan has standing to sue
 7 under the CLRA and **GRANT** the motion to dismiss with leave to
 8 amend.⁵

9 Defendants argue that the CLRA claims should be
 10 dismissed because the complaint "fails to identify a single
 11 representation or advertisement by [d]efendants that falsely
 12 represents the characteristics, standard, or quality of the
 13 *Rock Band* drum pedal." (D's Mot. to Dismiss p.16.)
 14 Plaintiffs allege that defendants, in their representations
 15 and omissions, violated: 1) Cal. Civ. Code § 1770(a)(5) by
 16 representing that the Rock Band drum kits have approval,
 17 characteristics, uses and benefits that they do not have; 2)
 18 Cal. Civ. Code § 1770(a)(7) by representing that the Rock
 19 Band drum kits were of a particular standard or quality when
 20 they were not; and 3) Cal. Civ. Code § 1770(a)(9) when they
 21 advertised and marketed Rock Band drum kits with the intent
 22 not to sell them as advertised. More specifically,

23
 24 ⁵ Defendants make the same standing argument with
 25 regard to plaintiffs UCL claims, discussed *infra*. For the same
 26 reasons that plaintiffs have failed to allege sufficient facts
 27 to establish that Morgan has standing to sue under the CLRA,
 28 plaintiffs have also failed to allege sufficient facts to
 establish that Morgan has standing to sue under the UCL. See
Norwest Mortgage, Inc., 72 Cal. App. at 224-25 (1999)
 (prohibiting non-California residents from asserting a UCL
 claim based on conduct occurring outside of California's
 borders).

1 plaintiffs allege that defendants violated the CLRA by
2 failing to disclose to the public that the Rock Band drum
3 pedals were defective and would readily break under ordinary
4 and expected usage, and by continuing to advertise, market,
5 and sell defective drum pedals notwithstanding knowledge of
6 the defect.

7 The CLRA proscribes both active misrepresentations about
8 the standard, quality, or grade of goods, as well as active
9 concealment related to the characteristics or quality of
10 goods that are contrary to what has been represented about
11 the goods. Outboard Marine Corp. v. Superior Court, 52 Cal.
12 App. 3d 30, 36 (1972). As stated in Outboard Marine, in the
13 CLRA context, "[f]raud or deceit may consist of the
14 suppression of a fact by one who is bound to disclose it or
15 who gives information of other facts which are likely to
16 mislead for want of communication of that fact." Id. at 37;
17 see also Daugherty v. American Honda Motor Co., Inc., 144
18 Cal. App. 4th 824, 833-36 (2006) ("although a claim may be
19 stated under the CLRA in terms constituting fraudulent
20 omissions, to be actionable the omission must be contrary to
21 a representation actually made by the defendant, or an
22 omission of a fact the defendant was obliged to disclose.").

23 I find that the complaint does not plead sufficient
24 facts to state a claim under the CLRA for affirmative
25 misrepresentation or concealment. The complaint fails to
26 identify any affirmative representation by defendant that the
27 drum pedals had a characteristic that they do not have, or
28 are of a standard or quality of which they are not. See Cal.

1 Civ. Code, § 1770, subd. (a)(5) & (7). Plaintiffs argue that
2 the complaint "includes numerous allegations of affirmative
3 representations"; yet the allegations to which plaintiffs
4 direct my attention merely state that plaintiffs weren't able
5 to play the game "as advertised."

6 Essentially, plaintiffs contend that any statement made
7 by defendants that the Rock Band game could be played with
8 drums was false because for certain customers, the pedal
9 eventually failed. But California courts require more than
10 "vague statements" about a product to form the basis of an
11 actionable CLRA misrepresentation claim. See, e.g., Long v.
12 Hewlett-Packard Co., No. 06-02816, 2007 U.S. Dist. LEXIS
13 79262, 2007 WL 2994812, at *20-21 (N.D. Cal. July 27, 2007)
14 ("The word 'notebook' describes the type of product being
15 sold; it does not constitute a representation regarding the
16 quality of the computer's parts, nor a representation
17 regarding the consistency or longevity of the computer's
18 operation."); see also Consumer Advocates v. Echostar
19 Satellite Corp., 113 Cal. App. 4th 1351 (2003) (statements of
20 "crystal clear digital video" and "CD-quality audio" were
21 non-actionable, while representations that customers would
22 receive "50 channels" and a "7-day schedule" were actionable
23 misrepresentations). The cases upon which plaintiffs rely
24 involve situations where a specific representation was made
25 about a product that proved false. For example, in Paduano
26 v. America Honda Motor Co., 169 Cal. App. 4th 1453 (2009),
27 the court held that "just drive the Hybrid like you would a
28 conventional car, while saving on fuel bills" could be a

misrepresentation because the Hybrid could not save on fuel bills if driven exactly like a conventional car. The representation was specific to what would happen if the Hybrid was driven a certain way. Here, plaintiffs have alleged no specific representations about the durability of the foot pedal.

Nor does the complaint allege facts showing that defendants were "bound to disclose" any defect in the drum pedal, particularly in light of the fact that both plaintiffs' drum pedals, according to the complaint, lasted the duration of the express warranty.⁶ See Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 969-70 (2008) (reviewing case law pertaining to when there is a duty to disclose). According to all relevant case law, defendants are only under a duty to disclose a known defect in a consumer product when there are safety concerns associated with the product's use. See, e.g., Daugherty, 144 Cal. App. 4th at 835-36; Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255 (2006); Long v. Hewlett-Packard Co., No. 06-02816, 2007 U.S. Dist. LEXIS 79262, 2007 WL 2994812, at *8 (N.D. Cal. July 27, 2007).

Accordingly, plaintiffs' claim for violation of the CLRA

⁶ The complaint alleges that plaintiff Morgan purchased his drum kit on July 6, 2008 and that his pedal broke on October 18, 2008, more than one month after the sixty day warranty expired. The complaint alleges that plaintiff Vasquez purchased his drum kit "on or about" December 15, 2007 and that his pedal broke "in February 2008." It is unclear whether Vasquez's pedal broke before or after the sixty day warranty elapsed and why it was not replaced under the extended warranty period provided by defendants throughout most of 2008.

1 fails because the complaint neither alleges facts showing
2 defendants were "bound to disclose" any known defects related
3 to the Rock Band drum pedal, nor alleges a single affirmative
4 representation by defendants regarding the drum pedals.

5 Plaintiffs' CLRA claim is **DISMISSED** with leave to amend.

6 Finally, defendants argue that plaintiffs fail to state
7 a claim under California's Unfair Competition Law, Cal. Bus.
8 & Prof. Code § 17200 et seq. The UCL prohibits acts or
9 practices which are (1) fraudulent, (2) unlawful, or (3)
10 unfair. Cal. Bus. & Prof. Code § 17200. Plaintiffs argue
11 that the complaint states a claim for unfair competition by
12 alleging that the defendants intentionally concealed a known
13 defect with the Rock Band drum pedals for the specific
14 purpose of "deliberately cheating large numbers of consumers
15 out of individually small sums of money" by forcing consumers
16 to either buy the new version of Rock Band or a replacement
17 part. (Compl. ¶¶ 31, 67). They argue that defendants'
18 actions violated all three prongs of the UCL.

19 By proscribing unlawful business practices, the UCL
20 borrows violations of other laws and treats them as
21 independently actionable. Practices may be deemed unfair or
22 fraudulent, however, even if not proscribed by some other
23 law. Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th
24 377, 383 (1992); see also Cel-Tech Communications, Inc. v.
25 Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180
26 (1999).

27 "[A]n action based on . . . [S]ection 17200 to redress
28 an unlawful business practice borrows violations of other

1 laws and treats these violations, when committed pursuant to
2 business activity, as unlawful practices independently
3 actionable." Farmers Ins. Exchange, 2 Cal. 4th at 383
4 (citations and internal quotations omitted). I have
5 concluded that plaintiffs have not stated a CLRA claim, and
6 plaintiffs have not identified any other law which they claim
7 defendants violated, the CLRA cannot serve to support a claim
8 under the "unlawful" prong of Section 17200.

9 With regard to the unfairness prong of the UCL, I find
10 that plaintiffs have failed to allege that defendants'
11 actions were unfair, as that term is used under the UCL.
12 Historically, in order to determine whether conduct is unfair
13 under the UCL, California courts applied a balancing test.
14 Under that test, "the determination of whether a particular
15 business practice is unfair necessarily involves an
16 examination of its impact on its alleged victim, balanced
17 against the reasons, justifications and motives of the
18 alleged wrongdoer. In brief, the court . . . weigh[s] the
19 utility of the defendant's conduct against the gravity of the
20 harm to the alleged victims." Motors, Inc. v. Times Mirror
21 Co., 102 Cal. App. 3d 735, 740 (1980); see also People v.
22 Casa Blanca Convalescent Homes Inc., 159 Cal. App. 3d 509
23 (1984) (stating that a practice in California is unfair "when
24 it offends an established public policy or when the practice
25 is immoral, unethical, oppressive, unscrupulous or
26 substantially injurious to consumers."). However, in
27 Cel-Tech Communications, Inc. v. Los Angeles Cellular
28 Telephone Co., 20 Cal. 4th 163 (1999), the Supreme Court of

1 California rejected this test and held that in the context of
 2 an unfair competition claim brought by a competitor, "any
 3 finding of unfairness . . . [must] be tethered to some
 4 legislatively declared policy." Id. at 185. While the
 5 Cel-Tech court expressly limited its holding to competitor
 6 lawsuits, the appropriate test to determine whether a
 7 practice is "unfair" in a consumer case under California law
 8 is uncertain.⁷ See Lozano v. AT&T Wireless Services, Inc.,
 9 504 F.3d 718, 735 (9th Cir. 2007) (stating "California's
 10 unfair competition law, as it applies to consumer suits, is
 11 currently in flux."); see also Spiegler v. Home Depot U.S.A.,
 12 552 F. Supp. 2d 1036, 1045 (C.D. Cal. 2008).

13 I conclude that under either test, plaintiffs' complaint
 14 does not sufficiently allege that defendants engaged in
 15 unfair practices. First, plaintiffs have not alleged facts
 16 sufficient to show that defendants' conduct violates a
 17 "legislatively declared policy." Second, under the balancing
 18 test, plaintiffs have failed to state a claim, as they do not
 19 allege that defendants made any specific representations
 20 about the composition of the drum pedals relative to their
 21

22 ⁷ Following the California Supreme Court's decision in
 23 Cel-Tech, appellate court opinions have been divided over
 24 whether the definition of "unfair" under the UCL as stated in
 25 Cel-Tech should apply to UCL actions brought by consumers. See
 26 Paulus v. Bob Lynch Ford, Inc., 139 Cal. App. 4th 659 (2006)
 27 (noting split of authority). Compare, for example, Smith v.
 28 State Farm Mutual Automobile Ins. Co. (2001) 93 Cal. App. 4th
 700, 720 n.23 (2001) ("we are not to read Cel-Tech as
 suggesting that such a restrictive definition of 'unfair'
 should be applied in the case of an alleged consumer injury")
 with Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917,
 940 (2003) (requiring, under Cel-Tech, that a UCL claim be
 tethered to a legislatively declared policy).

1 use; that plaintiffs suffered any substantial injury due to
2 the alleged defect in the drum pedals other than the cost for
3 the repair or replacement of the drum pedals; or that
4 defendants' actions violated any public policy. See Bardin,
5 136 Cal. App. 4th at 1270 (allegation that manufacturer used
6 less expensive and less durable steel, rather than cast iron,
7 in exhaust manifold to make more money does not state a
8 violation of public policy and was not immoral or unethical);
9 see also Spiegler, 552 F. Supp. 2d at 1045-46. Accordingly,
10 plaintiffs have not alleged sufficient facts to establish a
11 violation of the "unfairness" prong of the UCL.

12 Finally, the conduct alleged does not constitute a
13 fraudulent business act or practice. Unlike common law
14 fraud, a UCL violation can be shown even without allegations
15 of actual deception, reasonable reliance, and damage.
16 Historically, the term "fraudulent," as used in the UCL, has
17 required only a showing that members of the public are likely
18 to be deceived. Committee on Children's Television, Inc. v.
19 General Foods Corp., 35 Cal.3d 197, 211 (1983) *superceded on*
20 *other grounds as explained in* Californians for Disability
21 Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 228 (2006); see
22 also Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167
23 (2000). Plaintiffs contend that defendants' failure to
24 disclose the defect in the drum pedal, and their continued
25 efforts to market and advertise the Rock Band game as one in
26 which an individual could play the part of a drummer, were
27 deceptive practices that were "likely to deceive members of
28 the consuming public." (Compl. ¶¶ 71-74.) Fairly read, the

complaint's focus is on defendants' alleged failure to disclose their alleged knowledge that the drum pedals would fail to work properly after only slight use. However, as previously stated, "[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL." Berryman v. Merit Property Management, Inc., 152 Cal. App. 4th 1544, 1557 (2007) (failure to disclose detailed listings or breakdowns of specific escrow charges comprising transfer or document fees did not violate the UCL). This is because a consumer is not "likely to be deceived" by the omission of a fact that was not required to be disclosed in the first place.⁸

"In order to be deceived, members of the public must have had an expectation or an assumption about" the product at issue. Bardin, 136 Cal. App. 4th at 1275. Here, the complaint fails to allege facts showing that defendants made any representation regarding the durability of the drum pedals. Accordingly, the only expectation buyers could have had about the drum pedals was that they would function properly for the length of the express warranty, which according to the allegations of the complaint, was about how

⁸ Plaintiffs' reliance on Falk v. General Motors, 496 F. Supp. 2d 1088 (N.D.Cal. 2007) (manufacturer owed a duty to disclose a known safety defect) and Baggette v. Hewlett-Packard Co., 582 F.Supp. 2d 1261 (C.D. Cal. 2007) (specific representation that ink cartridge was empty when it was not was actionable) is misplaced. Here, there are no allegations that the allegedly defective foot pedal created a safety problem or that defendants made any representation about the durability of the pedal. Furthermore, at least one state court has declined to read Falk as recognizing a duty to disclose outside the safety area. Buller v. Sutter Health, 160 Cal. App. 4th, 981, 988 (2008).

1 long the pedals lasted. See Daugherty, 144 Cal. App. 4th at
2 838. Plaintiffs' allegations are therefore insufficient to
3 sustain a fraud-based claim under the UCL. Plaintiffs'
4 claims for violations of the UCL are **DISMISSED** with leave to
5 amend.⁹

6 Plaintiffs' amended complaint shall be filed by **August**
7 **14, 2009**. In view of the referral to Judge Spero for a
8 settlement conference, defendants need not respond to the
9 amended complaint until 15 days after the conclusion of the
10 settlement conference. The current class certification
11 schedule is **VACATED**. If the case does not settle, the
12 parties shall stipulate to a new schedule or contact the
13 Court for a status conference.

14 Dated: July 30, 2009

15 
16 Bernard Zimmerman
United States Magistrate Judge

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20 G:\BZALL\BZCASES\MORGAN v. HARMONIX\AMENDED ORDER ON D'S MOT TO DISMISS.FINAL.wpd
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27 ⁹ Defendants' motion to strike is **DENIED** without
28 prejudice. Issues related to plaintiffs' proposed class
definition are better resolved as part of the class
certification process.

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9
10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 INTEL CORPORATION, a Delaware
12 corporation,

13 Plaintiff,

14 vs.

15 HARRIS CORPORATION, a Delaware
16 corporation,

17 Defendant.

CV Case No. **09 3721**
**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

18
19 Plaintiff Intel Corporation ("Intel") alleges as follows:

20 1. This action arises from unauthorized use of the trade name and trademark CENTRIO by
21 defendant Harris Corporation ("Harris").

22 2. By using a trade name and trademark that is virtually identical to the world famous
23 CENTRINO® trademark, Harris has caused and is likely to continue to cause confusion that Intel is the
24 source or sponsor of Harris's goods and services, or that there is an association between Intel and
25 Harris. In addition, Harris's acts are causing, and/or are likely to cause, dilution of the CENTRINO
26 trademark. Consequently, Intel seeks injunctive relief and damages under the federal Lanham Act (15
27 U.S.C. §§ 1051, *et seq.*), the California Business and Professions Code, and the common law doctrines
28 of passing off and unfair competition.

1 **I. JURISDICTION**

2 3. This Court has personal jurisdiction over Harris because, on information and belief, it
3 conducts or has conducted business, as well as advertised and promoted its goods and services, in the
4 State of California and within this judicial district, and the effects of those acts have been felt in this
5 district.

6 4. This Court has jurisdiction over this matter pursuant to 15 U.S.C. § 1121 and 28 U.S.C.
7 §§ 1331, 1332, 1338 and 1367. Intel's claims are, in part, based on violations of the Lanham Act, as
8 amended, 15 U.S.C. §§ 1051, *et seq.* The Court has jurisdiction over the state law claims pursuant to
9 28 U.S.C. §§ 1332, 1338(b), and 1367.

10 **II. INTRADISTRICT ASSIGNMENT**

11 5. This is an intellectual property action and therefore shall be assigned on a district-wide
12 basis per Civil L.R. 3-2(c).

13 **III. THE PARTIES**

14 6. Plaintiff Intel is a Delaware corporation having its principal place of business at 2200
15 Mission College Boulevard, Santa Clara, California. Intel offers a wide variety of goods and services,
16 which are sold worldwide and throughout the United States, including in the Northern District of
17 California.

18 7. Upon information and belief, Defendant Harris has a principal place of business at 1025
19 West NASA Boulevard, Melbourne, Florida. Harris promotes its goods and services on the World
20 Wide Web at the following websites: www.harris.com. Upon information and belief, Harris targets
21 consumers nationwide, including consumers in California, and has numerous customers in this state.

22 **IV. INTEL'S BUSINESS AND MARKS**

23 8. Intel is a world-famous technology company that develops, manufactures and sells a
24 wide variety of computer, communications and Internet-related products and services. Intel's
25 customers include individual consumers, businesses, schools, and the government.

26 9. Since at least as early as 2003, Intel has used CENTRINO as a trade name, trademark
27 and service mark to identify certain products and services. Intel has invested hundreds of millions of
28 dollars in advertising and promotion of its products and services offered under its CENTRINO mark.

1 Intel has also licensed its CENTRINO mark to wireless service providers, hotspot location providers,
2 and manufacturers of wireless access points, media devices and software. Intel's extensive investment
3 and efforts in promoting its CENTRINO mark have made this mark famous.

4 10. Intel is the owner of U.S. trademark registrations for the mark CENTRINO, including
5 the following:

6 a. A U.S. Trademark Registration (Reg. No. 2981698) for its CENTRINO trademark
7 in International Class 9 which issued on August 2, 2005, covering the following goods: "Computers;
8 computer hardware; semiconductors; microprocesors and other semiconductor devices; integrated
9 circuits; computer chipsets; microcomputers; software programmable microprocessors; notebook and
10 laptop computers; portable computers; handheld computers; computer software for use in providing
11 multiple access to a global computer information network for searching, retrieving, transferring,
12 manipulating and disseminating a wide range of information; computer firmware, namely, computer
13 operating system software, computer utility software and other computer software used to maintain and
14 operate computer system all stored in a computer's read-only memory (ROM) or elsewhere in the
15 computer's circuitry; computer and telecommunications networking hardware; computer and
16 telecommunications networking software for wireless network communications and connectivity;
17 wireless and wired modems and communication cards." A copy of this registration, which is valid and
18 subsisting, is attached hereto as Exhibit A.

19 b. A U.S. Trademark Registration (Reg. No. 3067941) for its CENTRINO trademark
20 in International Class 38 on March 14, 2006, which covers the following services: "Communication
21 services namely, providing wireless access to global communications networks; telecommunication
22 consulting services." A copy of this registration, which is valid and subsisting, is attached hereto as
23 Exhibit B.

24 11. Through its extensive use, Intel also owns common law trademark rights in
25 CENTRINO for all of the goods and services and activities identified herein.

26 12. As a consequence of the extensive sales, advertising, promotion, and uses of the
27 CENTRINO trademarks, Intel has developed enormous recognition for its products and services under
28 the CENTRINO mark and has acquired and enjoys an immensely valuable reputation and tremendous

1 goodwill under the mark. The CENTRINO mark is world renowned, and is a “famous” mark for
2 purposes of 15 U.S.C. § 1125(c)(1).

3 **V. HARRIS’S USE OF CENTRIO**

4 13. Intel is informed and believes that Harris offers for sale goods and services under the
5 CENTRIO mark, including but not limited to multiviewers for displaying video signals, and related
6 computer software. Intel is informed and believes that such conduct takes place nationwide and in the
7 state of California.

8 14. The CENTRIO trademark is substantially and confusingly similar to the CENTRINO
9 trademark. CENTRIO is nearly identical in sight and sound, to the world famous CENTRINO
10 trademark. Harris has a pending U.S. Trademark Application (Serial No. 77/177195) for CENTRIO
11 for “electronic devices, namely, multiviewers for displaying one or more video signals in user-
12 customizable display formats; computer software, namely, multiviewer software for displaying one or
13 more video signals in user-customizable display formats.”

14 15. Intel has made numerous attempts in good faith to resolve this dispute amicably with
15 Harris, but such efforts have been unsuccessful, leaving Intel no choice but to file this Complaint.

16 **FIRST CAUSE OF ACTION**
17 **TRADEMARK INFRINGEMENT**
(15 U.S.C. § 1114)

18 16. Intel realleges and incorporates herein by reference the matters alleged in Paragraphs
19 1 through 15 of this Complaint.

20 17. Upon information and belief, Harris was aware of Intel’s business and its world-famous
21 CENTRINO mark prior to the adoption and use of the CENTRIO trademark.

22 18. Harris either had actual notice and knowledge, or had constructive notice, of Intel’s
23 ownership and registrations of the CENTRINO marks pursuant to 15 U.S.C. § 1072 prior to Harris’s
24 adoption and use of the CENTRIO trademark.

25 19. Harris is using the CENTRIO trademark in connection with the sale of its
26 goods/services without Intel’s consent, and with knowledge of Intel’s rights.

20. Harris's unauthorized use of the CENTRIO trademark falsely indicates to consumers that Harris's services are in some manner connected with, sponsored by, affiliated with, or related to Intel, Intel's licensees, or the goods and services of Intel and Intel's licensees.

21. Harris's unauthorized use of the CENTRIO trademark is also likely to cause consumers to be confused as to the source, nature and quality of the goods/services Harris is promoting or selling.

22. Harris's unauthorized use of the CENTRIO trademark in connection with the sale of its goods/services allows, and will continue to allow, Harris to receive the benefit of the goodwill established at great labor and expense by Intel and to gain acceptance of Harris's goods/services, not based on the merits of those goods/services, but on Intel's reputation and goodwill.

23. Harris's unauthorized use of the CENTRIO trademark in connection with the sale of its goods/services deprives Intel of the ability to control the consumer perception of the quality of the goods and services marketed under the CENTRINO mark, and places Intel's valuable reputation and goodwill in the hands of Harris, over which Intel has no control.

24. Harris's acts are likely to cause confusion, or to cause mistake, or to deceive consumers or potential consumers in violation of 15 U.S.C. § 1114.

25. Intel has been, is now, and will be irreparably injured and damaged by Harris's trademark infringement, and unless enjoined by the Court, Intel will suffer further harm to its name, reputation and goodwill. This harm constitutes an injury for which Intel has no adequate remedy at law.

**SECOND CAUSE OF ACTION
FALSE DESIGNATION OF ORIGIN
(15 U.S.C. § 1125(A))**

26. Intel realleges and incorporates herein by reference the matters alleged in Paragraphs 1 through 25 of this Complaint.

27. Harris's unauthorized use of the CENTRIO trademark falsely suggests that its services are connected with, sponsored by, affiliated with, or related to Intel, and constitutes a false designation of origin in violation of 15 U.S.C. § 1125(a).

1 28. Intel has been, is now, and will be irreparably injured and damaged by Harris's
 2 aforementioned acts, and unless enjoined by the Court, Intel will suffer further harm to its name,
 3 reputation and goodwill. This harm constitutes an injury for which Intel has no adequate remedy at
 4 law.

5
 6 **THIRD CAUSE OF ACTION**
 7 **FEDERAL TRADEMARK DILUTION**
 (15 U.S.C. § 1125(C))

8 29. Intel realleges and incorporates herein by reference the matters alleged in paragraphs
 9 1 through 28 of this Complaint.

10 30. The CENTRINO mark is world-renowned. It is a famous mark that is widely
 11 recognized by consumers, businesses and industry, and that identifies the products and services of Intel
 12 in the minds of consumers.

13 31. Harris's unauthorized use of the CENTRIO trademark began after Intel's CENTRINO
 14 mark had become famous.

15 32. Harris's unauthorized use of the CENTRIO trademark has, and will continue to have, an
 16 adverse effect upon the value and distinctive quality of the CENTRINO mark. Harris's acts blur and
 17 whittle away at the distinctiveness and identity-evoking quality of the CENTRINO mark. Harris's acts
 18 have diluted and are likely to continue diluting the famous CENTRINO mark in violation of 15 U.S.C.
 19 § 1125(c).

20 33. Intel has been, is now, and will be irreparably injured and damaged by Harris's
 21 aforementioned acts, and unless enjoined by the Court, Intel will suffer further harm to its name,
 22 reputation and goodwill. This harm constitutes an injury for which Intel has no adequate remedy at
 23 law.

24 **FOURTH CAUSE OF ACTION**
 25 **INJURY TO BUSINESS REPUTATION AND**
 26 **DILUTION UNDER CALIFORNIA LAW**
 (CAL. BUS. & PROF. CODE §14247)

27 34. Intel realleges and incorporates herein by reference the matters alleged in paragraphs
 28 1 through 33 of this Complaint.

35. Harris's unauthorized use of the CENTRIO trademark is likely to injure Intel's business reputation, and has diluted, and/or is likely to dilute, the distinctive quality of the CENTRINO mark and trade name in violation of the California Business and Professions Code §14247.

36. Harris willfully intended to trade on Intel's image and reputation and to dilute the CENTRINO trademark, acted with reason to know, or was willfully blind as to the consequences of its actions.

37. Harris's wrongful acts have caused and will continue to cause Intel irreparable harm. Intel has no adequate remedy at law for Harris's dilution.

38. Intel is therefore entitled to a judgment enjoining and restraining Harris from engaging in further acts of dilution pursuant to California Business and Professions Code § 14247.

**FIFTH CAUSE OF ACTION
COMMON LAW PASSING OFF
AND UNFAIR COMPETITION**

39. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 38 of this Complaint.

40. Harris's unauthorized use of the CENTRIO trademark constitutes passing off and unfair competition of the CENTRINO mark in violation of the common law of California.

41. Harris's wrongful acts have caused and will continue to cause Intel irreparable harm. Intel has no adequate remedy at law.

42. Intel is entitled to a judgment enjoining and restraining Harris from engaging in further acts of infringement and unfair competition.

**SIXTH CAUSE OF ACTION
UNFAIR COMPETITION
(CAL. BUS & PROF. CODE § 17200)**

43. Intel realleges and incorporates herein by reference the matters alleged in Paragraphs 1 through 42 of this Complaint.

44. Harris's acts described above constitute unfair competition in violation of California Business and Professional Code § 17200 et seq., as they are likely to deceive the public.

45. Harris's acts of unfair competition have caused and will continue to cause Intel irreparable harm. Intel has no adequate remedy at law for Harris's unfair competition.

46. Intel is entitled to a judgment enjoining and restraining Harris from engaging in further unfair competition.

PRAYER FOR RELIEF

WHEREFORE, Intel prays for relief as follows:

1. Entry of an order and judgment requiring that Harris and its agents, servants, employees, owners and representatives, and all other persons, firms or corporations in active concert or participation with it, be enjoined and restrained from (a) using in any manner the CENTRIO mark, or any name, mark or domain name that is confusingly similar to or a colorable imitation of Intel's CENTRINO mark; (b) doing any act or thing calculated or likely to cause confusion or mistake in the minds of members of the public, or prospective customers of Intel's products or services, as to the source of the products or services offered for sale, distributed, or sold, or likely to deceive members of the public, or prospective customers, into believing that there is some connection between Harris and Intel; and (c) committing any acts which will tarnish, blur, or dilute, or likely to tarnish, blur, or dilute the distinctive quality of the famous CENTRINO mark;

2. A judgment ordering Harris, pursuant to 15 U.S.C. § 1116(a), to file with this Court and serve upon Intel within thirty (30) days after entry of the injunction, a report in writing under oath setting forth in detail the manner and form in which Harris has complied with the injunction, ceased all sales of services under the CENTRIO trademark as set forth above;

3. A judgment ordering Harris, pursuant to 15 U.S.C. § 1118, to deliver up for destruction, or to show proof of said destruction or sufficient modification to eliminate the infringing matter, all articles, packages, wrappers, products, displays, labels, signs, vehicle displays or signs, circulars, kits, packaging, letterhead, business cards, promotional items, clothing, literature, sales aids, receptacles or other matter in the possession, custody, or under the control of Harris or its agents bearing the trademark CENTRIO in any manner, or any mark that is confusingly similar to or a colorable imitation of Intel's CENTRINO mark;

1 4. A judgment in the amount of Intel's actual damages, Harris's profits, Intel's reasonable
2 attorneys' fees and costs of suit, and pre-judgment interest pursuant to 15 U.S.C. §1117;

3 5. A judgment for enhanced damages under 15 U.S.C. §1117 and punitive damages under
4 state law as appropriate;

5 6. A judgment granting Intel such other and further relief as the Court deems just and
6 proper.
7

8 Dated: August 13, 2009

Respectfully submitted,

9 HARVEY SISKIND LLP
10 IAN K. BOYD
11 SETH I. APPEL

12 By: 
13

Seth I. Appel

14 Attorneys for Plaintiff
15 INTEL CORPORATION
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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

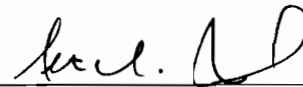
Dated: August 13, 2009

Respectfully submitted,

HARVEY SISKIND LLP

IAN K. BOYD
SETH I. APPEL

By: _____



Seth I. Appel

Attorneys for Plaintiff
INTEL CORPORATION

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36 and 38

Reg. No. 2,981,698

United States Patent and Trademark Office

Registered Aug. 2, 2005

Amended

OG Date Oct. 21, 2008

**TRADEMARK
PRINCIPAL REGISTER**

CENTRINO

INTEL CORPORATION (DELAWARE CORPORATION)
2200 MISSION COLLEGE BOULEVARD
SANTA CLARA, CA 95052

THE ENGLISH TRANSLATION OF THE WORD CENTRINO IN THE MARK IS "DOILY".

FOR: COMPUTERS, COMPUTER HARDWARE; SEMICONDUCTORS; MICROPROCESSORS AND OTHER SEMICONDUCTOR DEVICES; INTEGRATED CIRCUITS; COMPUTER CHIPSETS; [COMPUTER MOTHERBOARDS AND DAUGHTERBOARDS;] MICROCOMPUTERS; [COMPUTER WORKSTATIONS, NAMELY, PROCESSORS, CENTRAL PROCESSING UNITS, COMPUTER FURNITURE, COMPUTER MONITORS, KEYBOARDS, COMPUTER PERIPHERALS, COMPUTER PRINTERS;] SOFTWARE PROGRAMMABLE MICROPROCESSORS; NOTEBOOK AND LAPTOP COMPUTERS; PORTABLE COMPUTERS; HANDHELD COMPUTERS; [COMPUTER PERIPHERALS; PERSONAL DIGITAL ASSISTANTS;] COMPUTER SOFTWARE FOR USE IN PROVIDING MULTIPLE USER ACCESS TO A GLOBAL COMPUTER INFORMATION NETWORK FOR

SEARCHING, RETRIEVING, TRANSFERRING, MANIPULATING AND DISSEMINATING A WIDE RANGE OF INFORMATION; COMPUTER FIRMWARE, NAMELY, COMPUTER OPERATING SYSTEM SOFTWARE, COMPUTER UTILITY SOFTWARE AND OTHER COMPUTER SOFTWARE USED TO MAINTAIN AND OPERATE COMPUTER SYSTEM ALL STORED IN A COMPUTER'S READ-ONLY MEMORY (ROM) OR ELSEWHERE IN THE COMPUTER'S CIRCUITRY; COMPUTER AND TELECOMMUNICATIONS NETWORKING HARDWARE; COMPUTER AND TELECOMMUNICATIONS NETWORKING SOFTWARE FOR WIRELESS NETWORK COMMUNICATIONS AND CONNECTIVITY; [NETWORKING SERVERS; COMPUTER NETWORK ADAPTERS, SWITCHES, ROUTERS AND HUBS;] WIRELESS AND WIRED MODEMS AND COMMUNICATION CARDS; [MOBILE TELEPHONES; REPLACEMENT OR STRUCTURAL PARTS THEREFOR], IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 3-0-2003; IN COMMERCE 3-0-2003.

SER. NO. 78-171,347, FILED 10-4-2002.

*In testimony whereof I have hereunto set my hand
and caused the seal of The Patent and Trademark
Office to be affixed on Oct. 21, 2008.*

DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE

EXHIBIT A

Int. Cl.: 38

Prior U.S. Cls.: 100, 101 and 104

United States Patent and Trademark Office

Reg. No. 3,067,941

Registered Mar. 14, 2006

**SERVICE MARK
PRINCIPAL REGISTER**

CENTRINO

INTEL CORPORATION (DELAWARE CORPORATION)

2200 MISSION COLLEGE BOULEVARD

SANTA CLARA, CA 95052

**FOR: COMMUNICATION SERVICES NAMELY,
PROVIDING WIRELESS ACCESS TO GLOBAL
COMMUNICATIONS NETWORKS; TELECOMMU-
NICATION CONSULTING SERVICES, IN CLASS 38
(U.S. CLS. 100, 101 AND 104).**

FIRST USE 3-0-2003; IN COMMERCE 3-0-2003.

**THE MARK CONSISTS OF STANDARD CHAR-
ACTERS WITHOUT CLAIM TO ANY PARTICULAR
FONT, STYLE, SIZE, OR COLOR.**

**OWNER OF U.S. REG. NO. 2,931,701 AND OTH-
ERS.**

**THE ENGLISH TRANSLATION OF CENTRINO IS
DOILY.**

SER. NO. 78-581,617, FILED 3-7-2005.

WENDY GOODMAN, EXAMINING ATTORNEY

EXHIBIT B